

(2010) 09 BOM CK 0100
In the Bombay High Court
Case No : Writ Petition No. 576 of 2010

Mohammad Hayatkhan Karimkhan and Mohd. Abdulkhan Hayatkhan APPELLANT

Vs

Taramati Khindkar and Others RESPONDENT

Date of Decision : 14-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 4
Constitution of India, 1950 — Article 227
Transfer of Property Act, 1882 — Section 53A

Citation : (2011) 7 ALLMR 644 : (2011) 2 MhLj 653

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : M.A. Kulkarni, for the Appellant; S.Y. Mahajan, for Respondents Nos. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Borde, J.—Heard Mrs. Kulkarni, learned Counsel for petitioners and Mr. S.Y. Mahajan, learned Counsel for Respondents No. 1 to 3.

Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

2. Petitioners are original plaintiffs and are seeking quashment of the order dated 03.12.2009, passed by Civil Judge, Junior Division, Bhoom, below Exhibit-86 in Regular Civil Suit No. 120/2006.

3. Petitioners-original plaintiffs instituted suit against defendants - respondents herein claiming specific performance of agreement alleged to have been executed on 21.12.1976 by the defendants. The dispute relates to land S. No. 70/ D (G. No. 129) situate at village Mankeshwar, Tq. Bhoom.

4. It is contended by plaintiffs in the plaint that defendants are legal heirs of one Bajiaba Khindkar. He had a brother by name Dajiaba. Both of them are dead. It

is contended that in the year 1975-76, Dajiaba and Bajiaba had handed over possession of the property to the plaintiffs on yearly lease basis. It is, thus, contended that they (plaintiffs) were in possession of the property as tenants. In the year 1976, Dajiaba and Bajiaba agreed to alienate an area to the extent of 57 ares for consideration of Rs. 2500/- to plaintiff No. 1 and executed 'Isar Pavati' on 21.12.1976. Deceased brothers accepted Rs. 1500/- towards part of consideration amount and balance was agreed to be paid at the time of execution of sale deed. The land was already given in possession of plaintiffs and after execution of agreement to sell, their possession continued on the basis of said agreement. The deceased brothers were required to obtain permission in respect of alienation of the property and thereafter sale deed was to be executed. During their lifetime, deceased brothers Dajiaba and Bajiaba did not secure the permission. After their demise, defendants herein were supposed to secure the permission and complete the transaction, however, defendants No. 1 to 3 presented Regular Civil Suit No. 79/83 against plaintiffs claiming decree of perpetual injunction. Said suit came to be dismissed on 28.11.1989. Against dismissal of suit, an appeal was presented, being Regular Civil Appeal No. 06/90 and said appeal came to be dismissed on 10.03.1998. Plaintiffs, thus, are claiming decree of specific performance against defendants as they failed to honour the agreement executed by deceased Dajiaba and Bajiaba.

5. Defendants appeared and resisted the suit by filing written statement. Defendants have specifically denied the contention in respect of alleged tenancy of the plaintiffs. They have also denied their liability in respect of execution of sale deed in favour of plaintiffs and prayed for dismissal of the suit.

6. The trial Court, on the basis of pleadings raised by respective parties, framed issues on 06.03.2007 and proceeded to record evidence of the parties. In the suit, evidence of the parties has already been recorded and the matter was posted for hearing arguments. At that stage, plaintiffs moved an application requesting the Court to frame additional issue in respect of tenancy of the plaintiffs. It is the contention of the plaintiffs that before execution of the agreement to sell, they were inducted over the property in their capacity as tenants and as such, issue in respect of plaintiffs' tenancy in relation to the suit land is required to be framed.

7. The application was opposed by the defendants contending that the suit is essentially for specific performance of agreement and question in respect of alleged tenancy raised by plaintiffs does not fall for consideration or adjudication by the Court. It is contended that in the document at Exhibit-102, plaintiffs have specifically contended that they are in possession on the basis of agreement to sell and in part performance of the agreement. It is also contended that the application is presented at belated stage when recording of evidence is over and the matter is posted for final arguments. The plea raised is not bona fide, so also the issue suggested is not relevant for decision of the suit. As such, the issue need not be framed and the application be rejected.

8. Considering the contentions raised by the parties, the trial Court proceeded to reject the application by order dated 03.12.2009 and said order of rejection of application, passed by Civil Judge, Junior Division, Bhoom, is subjected to challenge in this petition presented by plaintiffs under Article 227 of the Constitution.

9. It is contended by plaintiffs - petitioners that there are specific pleadings raised in the plaint in respect of creation of tenancy by deceased Dajiaba and Bajiaba during their life time in the year 1975-76 and the amount of lease rent has also been mentioned in para 3 of the plaint. The possession of plaintiffs prior to execution of agreement to sell was on the basis of tenancy agreement and as such, issue in respect of tenancy of plaintiffs is very much essential for deciding the controversy involved in the suit. It is further contended that issue of tenancy can be framed at any stage of the proceedings and even at appellate stage. It is contended that there is mandate of law to frame issue of tenancy and refer the same for adjudication of tenancy authorities once pleadings in that regard are recorded in the suit. It is further contended that a receipt is placed on record to demonstrate the claim of tenancy raised by plaintiffs. If the Court was not satisfied on the basis of pleadings, plaintiffs, very well, could have been called to substantiate their claim, however, outright rejection of application by the trial Court is erroneous. It is prayed that thus, writ petition deserves to be allowed.

10. Learned Counsel appearing for the Respondents has opposed the prayer contending that issue raised is not bona fide. In the previous litigation instituted by respondents, such plea in respect of tenancy was not raised and petitioners specifically claimed their entitlement to remain in possession on the basis of agreement to sell and, therefore, the claim was upheld by the Civil Court. Plaintiffs are, thus, estopped from raising such plea. It is also further contended that the only relief claimed in the suit is in respect of specific performance of agreement and for deciding the permissibility to grant relief in respect of specific performance, the issue in respect of tenancy of plaintiffs does not fall for consideration and the alleged claim of plaintiffs need not be adjudicated. The trial Court was justified in turning down the application. Defendants/respondents herein, thus, prayed for dismissal of writ petition.

11. My attention has been invited to the judgment in Regular Civil Suit No. 79/83 presented by Respondents No. 1 to 3 in the Court of Civil Judge, Junior Division, Paranda. The suit was presented claiming decree of perpetual injunction in respect of property in dispute. Petitioners have raised plea in respect of their possession on the basis of agreement to sell alleged to have been executed by Dajiaba and Bajiaba on 21.12.1976. They claimed their entitlement to remain in possession in part performance of the agreement. The contentions raised by petitioners were accepted by trial Court and suit presented by respondents came to be dismissed in view of the judgment and decree dated 28.11.1989. The appeal presented by defendants No. 1 to 3/respondents No. 1 to 3, being Regular Civil Appeal No. 06/90, came to be dismissed by Joint District Judge, Osmanabad

on 10.03.1998. The appellate Court has specifically recorded a finding that petitioner No. 1 herein has been put in possession over the property on the basis of agreement to sell and he is entitled to protect his possession in view of Section 53A of the Transfer of Property Act.

12. Learned Counsel appearing for petitioners contends that defendants in the said suit i.e. petitioners herein raised plea in respect of part performance for protecting their interest in the earlier suit, which does not disentitle them from raising a claim in respect of their tenancy in the subsequent proceedings. It is contended that entitlement to remain in possession over the property in part performance of agreement to sell was a defence raised to oppose the claim raised by respondents herein i.e. plaintiffs in the said suit. It does not mean that petitioners have given up their plea of tenancy.

13. In order to frame an issue and direct reference thereof for determination of tenancy authorities, one has to see, whether such issue is necessary for adjudication of the claim made in the suit. It is also necessary to consider as to whether plea raised is bona fide or merely raised to delay decision in the matter, which entitle plaintiffs - petitioners herein to remain in possession over the property until adjudication of the issue. It is also necessary to see whether there is sufficient material placed on record to frame an issue and to make a reference. It is well settled that frivolous plea of tenancy need not be a matter of reference and the Court, before framing an issue and directing reference thereof, is entitled to see whether such plea is bona fide and has any basis in the pleadings or the material placed on record.

14. Reliance is placed by petitioners on the judgment in the matter of Pulmati Shyamlal Mishra and Anr. v. Ramkrishna Gangaprasad Bajpai and Ors. reported in 1981 Mh.L.J. 321. It is contended that the provisions enable the Court to (i) seek clarification of the bald pleadings; (ii) insist on production of documents in doubtful cases; and (iii) get explanation for the adverse factors even where the litigant is driven to rely on oral evidence, with a view to frame correct issues and restrict the trial of the case only to the same. It is, thus, contended that the trial Court ought to have sought clarification from the plaintiffs before rejecting the application.

15. In paragraph 34 of the reported judgment, the Division Bench has observed thus:

34 It is also not correct to assume that the Court is under any obligation to frame and remit the issue of tenancy mechanically, merely on the same being raised in the written statement, without judicial satisfaction of its necessity and justification. Cases can be conceived, when tenancy plea may appear to be patently frivolous, fraudulent and part of the dilatory strategy, and may not by itself attract Sections 85 and 85A of the Tenancy Act. The remittance of any such tenancy issue and the trial thereof by the Mamlatdar and higher authorities in appeal and revision, is known to have become a long winding and time

consuming process. This delay enures for the benefit of the person in possession of the land. This, not unnaturally, prompts and tempts him to claim to be the tenant out of sheer anxiety to perpetuate his unmerited possession, even if no basis exists for the claim.

It is further observed by the Division Bench in paragraphs No. 35 and 36 of the judgment, thus:

35 This only highlights the danger of any literal or mechanical construction of these provisions in disregard of their content and context and any casual approach in the matter. Order 14 of the CPC contemplates framing of issues by the Court on application of mind, not only to the pleading but also to the documents produced, while Rule 4 thereof empowers it to examine any person and enforce production of additional documents for that purpose. These provisions thus enable the Courts to (1) seek clarification of the bald pleadings, (2) insist on production of documents in doubtful cases, and (3) get explanation for the adverse factors even where the litigant is driven to rely on oral evidence, with a view to frame correct issues and restrict the trial of the case only to the same. There is nothing in Section 85 or 85A or in any other provisions of the Tenancy Act, robbing the Courts of these powers so indispensable for the effective adjudication and, relieving it or its duty imposed thereunder. These sections provide for remittance of issues only if and when the same are framed on being found to arise on such scrutiny and it is after that stage that the Civil Court ceases to have jurisdiction with regard to the same till the finding is certified by the Tenancy authorities. The process contemplated under Order 14 does not contemplate any trial of such issue but it does involve nipping of any such plea in the bud, if the Court, subject to any contrary decision in appeal and revision, judicially concludes against its framing and raising. This is implicit in the separate provision for framing issues and the trial thereof. This process does not thus involve any conflict between Order 14 of the CPC or Sections 85 and 85A of the Tenancy Act nor any question of any lack or excess of jurisdiction. Such scrupulous compliance with these provisions alone can prevent such possible abuse of its process.

36 The Court has thus a duty to examine the substance and refuse to frame and remit any such issue if the same appears to be demonstrably frivolous and mala fide. It is obviously not easy to draw a dividing line between such frivolous and mala fide pleas on the one hand and the ones turning out to be false at the end of the trial on the other. Facts of a given case, however, would rarely fail to furnish the required indication to the judicially trained mind.

16. Thus, it needs to be considered as to whether really the issue in respect of tenancy raised by the plaintiffs requires determination by the Court while considering final relief claimed in the suit and secondly, whether the plea raised by plaintiffs is bona fide or is raised merely to prolong the litigation, which definitely benefits plaintiffs to continue their possession until final determination of the controversy. It is contended by plaintiffs that even if the suit is for specific

performance of agreement, as there are pleadings noted in the plaint in respect of tenancy of plaintiffs, the Court is obliged to frame an issue and refer same for adjudication to the tenancy authorities.

17. It is well settled that the plea of tenancy need not be framed based on vague plea. Rules of the pleadings require that essential particulars must be furnished before the Court proceeds to frame an issue. In the instant matter, plaintiffs have merely averred in the plaint in respect of alleged tenancy. At this stage, it cannot be overlooked that in earlier litigation, such plea was not raised and defence raised for continuing over the property was part performance of the agreement. In these circumstances, it cannot be said that plea raised by plaintiffs is bona fide one. The second reason, why the issue in respect of tenancy need not be framed, is that said issue does not require adjudication in a suit presented by plaintiffs claiming decree of specific performance of agreement. A Division Bench of this Court, in the matter of Nilesh Construction Company and Another Vs. Gangubai and Others, , has observed that:

Before a reference to the Mamlatdar for deciding the issue of tenancy under the Tenancy Act is made, the alleged tenant must disclose in his pleadings details about the tenancy and the exact nature of the right which is claimed by him. An issue of tenancy cannot be raised on a vague plea. If it so raised, it would be permissible to recall the reference.

18. In the decision rendered by the Apex Court in the matter of Thomas Antony Vs. Varkey Varkey, , the Apex Court has observed:

While making a reference to the Tribunal mandatory, the legislature cannot be said to have intended that even a patently frivolous, mala fide and illegal plea of tenancy taken by a party merely to delay the proceeding and to remain in possession of the property is also to be referred to the Tribunal. The statutory provisions envisage a case where a bona fide and legally sustainable plea of tenancy is taken by the party, that question shall be referred to the Tribunal.

19. In the instant matter, on consideration of all the circumstances, I am of the considered view that the plea of tenancy raised by the plaintiffs in the plaint is not bona fide. The plaintiffs themselves, in the earlier litigation, have claimed protection u/s 53A of the Transfer of Property Act claiming their entitlement to remain in possession over the property. The second reason, why the issue of tenancy need not be framed and referred to the tenancy authorities, is that the issue of tenancy does not fall for determination in the suit presented by plaintiffs wherein only claim made by them is in respect of specific performance of agreement. As the plaintiffs are claiming specific performance of agreement, the issues as regards validity of the agreement and readiness and willingness of the party to perform his part of contract and the question, such as limitation, needs to be taken into consideration. The plea of tenancy raised by plaintiffs does not form the core issue and even an ancillary issue for determination of claim raised in the suit.

20. It is also to be noted that the application is tendered by plaintiffs at the fag end of trial i.e. when the suit is posted for hearing arguments of the parties. In these circumstances, defendants/respondents herein are justified in contending that the plea is raised at belated stage merely to delay trial of the suit and with a view to continue possession of plaintiffs over the property.

21. For the reasons recorded above, I am of the view that the petition does not deserve favourable consideration and as such, same needs to be dismissed.

22. In the result, Writ Petition stands dismissed. Rule discharged. In the facts and circumstances of this case, there shall be no order as to costs.